WEE YEE YING & ANOR

v.

EMIN SADI

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[CIVIL SUIT NO: K22-153-1995]
17 JUNE 2005

LAND LAW: *Transfer - Fitness of instrument - Allegation of fraud - Whether property fraudulently transferred to 1st defendant by virtue of a forged memorandum of transfer*

The plaintiffs were the children of one Swee Kim ('the deceased') – their mother – and they were bequeathed a parcel of certain land ('the property') under her will. They were also the executors of the deceased's estate and the deceased was at all relevant times the registered owner of the property; however, it was subsequently discovered that the 1st defendant had somehow became the registered owner of the property. Therefore, the plaintiffs commenced this action to have the transfer and its registration expunged on the ground that there was fraud and the instrument resulting in the transfer was a forgery. The plaintiffs' case was that the memorandum of transfer that was used to register the 1st defendant as the owner was a forged instrument because the thumbprint that was affixed to that instrument, allegedly that of the deceased, was not that of the deceased. Thus, the issue requiring determination was whether the property was fraudulently transferred to the 1st defendant by virtue of a forged memorandum of transfer.

Held (for the plaintiffs):

[1] On the facts, there was nothing much in the evidence of the 1st defendant as compared to the fact that the property was stated to have been transferred by a mother to a son by the name of the 1st defendant with no monetary consideration, when it was common ground that the 1st defendant was not the son of the deceased. There was also the fact that the identity card of the mother that was stated in the instrument was not that of the deceased but belonged to another person. The 1st defendant attempted to salvage the situation by saying that it was a Singaporean who had paid RM300,000 for the property and had used his name to own the property, but if that were so, one would expect the Singaporean to be actively involved in this case in order to salvage something out of the money he had allegedly expended. Instead, the 1st defendant said that the Singaporean was nowhere to be found which caused this court to conclude that the Singaporean was a figment of the 1st defendant's imagination.

Given the evidence, the 1st defendant had failed totally to support his assertion that the instrument was a genuine one. There was no doubt whatsoever that the instrument was a forgery. Hence, the transfer of the property to the 1st defendant under the said memorandum of transfer was annulled on the ground of fraud. (pp 751 f-h & 752 f)

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(foll)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Hock Hua Bank (S) Bhd v. Lam Tat Ming & Ors [1995] 4 MLJ 328 ***(foll)***
Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 114(e)

For the plaintiff - Norbert Yapp; M/s Jayasuriya Kah & Co
For the 1st defendant - Gilbert Bulagang; M/s Bulagang & Co
For the 2nd defendant - Athmat Hassan (Dgku Fazidah Hatun Pg Bagul with him); Senior State Counsel

Reported by Suresh Nathan

JUDGMENT

Ian HC Chin J:

Introduction

The plaintiffs, Wee Yee Ying and Wee Yee Liang, were the children of a person known variously as Tan Swee Kim, Chin Swee Kim and Swee Kim Bte Chin Ah See (their mother) and they were by her will, made on 20 December 1986, bequeathed a parcel of land held under Native Title No. 1705 and situated at Kg Mambawang, Inanam ("the property"). The plaintiffs are also the executrix/executor of the estate of their mother. The mother was at all relevant times registered owner of the property. Sometime in December 1991, it was discovered that somehow the 1st defendant had become the registered owner of the property. Hence, this action commenced on 30 December 1995, to have the transfer and its registration expunged on the ground that there was fraud and the instrument resulting in the transfer was a forgery. The 2nd defendant, the Assistant Collector of Land Revenue was also sued but Senior State Counsel, Athmat Hassan, had indicated that the 2nd defendant will take no part in the proceedings but will abide by the decision of the court.

The Plaintiffs' Case

The plaintiffs' case was that the memorandum of transfer that was used to cause the registration of the defendant as being the owner was a forged instrument in that the thumb-print that was affixed to that instrument and

allegedly that of the mother was not that of the mother. The impugned instrument nor any copy of the instrument was tendered as evidence. But the parties and their counsel elicted evidence without any objection from any side regarding the contents of this instrument. The instrument said that the transfer was from a mother to the son. It is common ground that the 1st defendant was not the son of the mother. It was not till sometime in December 1991 that the mother discovered that her land had been transferred away on 9 July 1991. She lodged a caveat against the property alleging forgery. She, on 24 December 1991, made a police report of the fraudulent transfer and to report that she was still holding the original issued copy of the title. Even now the issue copy of the title is with the plaintiffs after it was handed over to one of them by the mother before she died in 1994. The advocate, John Kah, who had been acting for the mother since the 1970s had testified unchallenged that the mother had always signed documents and had never use her thumb print for the purpose. Again, though the instrument was not produced, both counsel are on common ground that a thumb-print allegedly that of Swee Kim binti Chin Ah See was affixed to the instrument. Before I set out the evidence of the case for the defendant, let me apprise myself of the law on the standard of proof.

The Standard Of Proof

In *Hock Hua Bank (S) Bhd v. Lam Tat Ming & Ors* [1995] 4 MLJ 328 I was of the view that an allegation of fraud in a civil case has to be established beyond reasonable doubt and this view appears to be the correct one as the Federal Court in *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, decided that:

> … In our view, the Court of Appeal has obviously misdirected itself in rejecting the proposition of law applied in *Saminathan v. Pappa, supra,* that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb the trend …

The court there also said that the decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 2 CLJ 133 where it was held that the standard of proof required to prove forgery in civil cases in one on a balance of probabilities was concerned with forgery and not with fraud. However, the present case is involved with both fraud and forgery as para. 3 of the statement of claim is in these terms:

> 3. The said land was fraudulently transferred to the 1st Defendant by virtue of a forged Memorandum of Transfer dated the 5th day of July 1991 ...

So the forgery of the instrument must be proved on a balance of probabilities while the transfer alleged to be done fraudulently must be proved beyond reasonable doubt. The evidence adduced for the defence must be considered together with those of the plaintiffs.

The Evidence Of The 1st Defendant

The 1st defendant said that he was present in the office of a commissioner for oaths together with one Chinese Hokkian whom he called Ho Kian, a Singaporean called Ah Atik and a woman called Swee Kim binti Chin Ah See. He said he saw RM300,000 being handed over to Swee Kim binti Chin Ah See after she had put her right thumb-print on the instrument. He explained that his name was used as being the transferee because the commissioner for oaths had said that the Singaporean Ah Atik cannot be registered as the owner of the land. He also said that he saw Swee Kim binti Chin Ah See handed over the title and her identity card to the commissioner for oaths. As for the statement that he was the son, he said that it was put there by Swee Kim binti Chin Ah See for the purpose of avoiding the payment of tax. Having set out the evidence of both side, I now will produce to deal with the issues which the parties have stated in these terms:

1. Whether the land held by Swee Kim bte Chin Ah See ("the deceased") under Native Title No. 013017055 ("the said land") was fraudulently transferred to the 1st Defendant by virtue of a forged Memorandum of Transfer dated 5.7.1991 and by the 1st Defendant who falsely claimed to be the son of the deceased.

2. Whether the 1st Defendant had paid RM300,000.00 to the deceased as consideration for the purchase of the said land.

I will deal with them one by one and not necessarily in the sequence they have been mentioned.

Whether Memorandum Of Transfer Was Forged

The plaintiffs' counsel contended that since the instrument was impugned it was for the 1st defendant to prove the genuineness of the instrument. The instrument had been impugned in the several manners which I have earlier set out, that is by a police report being made and by the lodging of a caveat. The 1st defendant's counsel contended that the police report was of no value as it was not established that it was the mother who had actually made the report and not the son who accompanied her who made the report. It was premised on the contention that the mother did not make "an official search of the land office" and therefore could not have not known of the transfer to be able to make the allegation in the police report. A certified true copy of an abstract of the police report was admitted in evidence and the abstract said that the report was made by the mother in which she said the land had been

transferred to the name of the 1st defendant without her consent and that she still had the original title. Unless the 1st defendant is able to show that the abstract was incorrect in the matters of who made the report and as to what was reported, the abstract must be taken to have been correctly recorded by the police officer concerned under the presumption of regularity (see s. 114(e) of the Evidence Act). The 1st defendant cannot raise doubt by mere summation but must show by evidence that it was not the mother who made the report when the abstract said it was the mother who made the report. As for the report being made in English and the mother not being able, according to the son, to speak in English, as raising a doubt as to whether the mother really made the report, this was never put to the son by the counsel for the 1st defendant that it was the son who made the report and not the mother and consequently we do not have the evidence on this point and again it is pure summation with no evidence to support the allegation that it was not the mother who made the report since this was an issue the recording officer could have been called to testify or the son could have been asked in what language the mother used when making the report. As for the contention that it was unbelievable that the mother only came to realize the property was transferred away some five months after the registration of the transfer, I do not see the merit of this argument since nobody would bother to check or worry about the property she owns when she still holds the title. The mother was only alerted when some broker informed her that the property was in someone's else name.

In the end there is nothing much in the evidence of the 1st defendant as compared to the fact that the property was stated to have been transferred by a mother to a son by the name of the 1st defendant with no monetary consideration when it was common ground that the 1st defendant was not the son of the mother. Then there is also the fact that the identity card of the mother that was stated in the instrument was not that of the mother but belonged to a person by the name of Shiak Vui Ming. The 1st defendant attempted to salvage the situation by saying that it was a Singaporean who had paid RM300,000 for the property and had used his name to own the property but if that really was the case, one would expect the Singaporean to be actively involved in this case in order to salvage something out of the money he had allegedly expended but instead we have the 1st defendant's evidence to say that the Singaporean was nowhere to be found which makes me conclude that the Singaporean and him making the payment was a figment of his imagination. To my mind, there is no doubt whatsoever that the instrument was a forgery. Given the evidence, the 1st defendant had failed totally to support his assertion that the instrument was a genuine one. As the law goes (see *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ

17) when the instrument had been disputed by the plaintiffs and there is sufficient evidence adduced on behalf of the plaintiffs to support the allegation that the transfer was a forgery, it is incumbent on the defendant to prove that the instrument is genuine. Nothing is easier in this case for the defendant to do and that is by adducing evidence of an expert who had compared the thumb-print of the mother (which was available from the identity card and kept by the National Registration Department) with the thumb-print on the instrument (which was kept by the land office) to say that the two thumb-prints are the same and therefore there was no question of forgery. Such a simple task to discharge the onus and yet the 1st defendant did not bother. It lends support to the conclusion which I hold that the 1st defendant knew that the thumb-print was not that of the mother and giving further support to my conclusion that the instrument was a forgery. I turn to the next issue of fraud.

Whether The Transfer Was Fraudulent

When a forged instrument was used to effect a transfer to the 1st defendant, there is absolutely no doubt in my mind that the transfer was done fraudulently. What more when the transferee was stated to be the son when he was not. This leaves the final issue of whether the 1st defendant made the payment.

Whether The 1st Defendant Paid RM300,000

By the 1st defendant's own evidence, it was not him who made the payment but a Singaporean which even that, as mentioned earlier and for the reasons stated earlier, I find not to be true.

Conclusion

In the premise, judgment is entered for the plaintiffs in terms of the following prayers of the statement of claim, *viz*:

(a) that the transfer of the property to the 1st defendant effected under the said memorandum of transfer dated 5 July 1991 be annulled on the ground of fraud;

(b) that the 2nd defendant expunge from the register and records the registration of the said transfer;

(c) that the 2nd defendant cancel the certified copy of the land title for the property that was issued under s. 120 of the Land Ordinance; and

(d) damages to be assessed by the deputy registrar and to be paid by the 1st defendant occasioned by the fraudulent transfer and the said forged memorandum of transfer; and

(e) costs to be paid by the 1st defendant to the plaintiff.